STATE OF ILLINOIS
ILLINOIS COMMERCE COMMISSION

PACE, the Suburban Bus Division of the Regional Transportation Authority,	)	
Complainant,	)	
v.	)	Docket No. 00-0280
COMMONWEALTH EDISON COMPANY,	)	
Respondent.	)	

COMMONWEALTH EDISON COMPANY'S RESPONSE TO PACE'S SUPPLEMENTAL MEMORANDUM OF LAW IN SUPPORT OF COUNT II

Commonwealth Edison Company ("ComEd"), by its attorneys, respectfully submits the following Response to PACE's Supplemental Memorandum in Support of Count II ("Supplemental Memo") of its Complaint. For the reasons stated herein and in ComEd's previously filed Response Memorandum Concerning Count II of PACE's Complaint, Count II fails to state a claim as a matter of law and should therefore be dismissed.

INTRODUCTION

In its Supplemental Memo, PACE reasserts the argument that ComEd should refund charges that it collected from PACE pursuant to Section 9-221 of the Public Utilities Act, 220 ILCS 5/9-221 because, pursuant to Section 4.08 of the Regional Transportation Authority Act (the "RTA Act"), 70 ILCS 3615/4.08, PACE is exempt from "all municipal fees and taxes." See Supplemental Memo, p. 3. As additional support for its argument, PACE also cites Johnson v. Partee, 105 Ill.2d 186, 473 N.E.2d 944 (1984). PACE's argument is unavailing. Partee adds nothing to PACE's argument. Accordingly, Count II of PACE's Complaint should be dismissed with prejudice for failure to state a claim.

ARGUMENT

A. At All Relevant Times, the Legal Incidence Of the Municipal Gross Receipts Taxes was On Utilities Like ComEd, and Not on Customers like PACE

As an initial matter, the RTA Act does not exempt PACE from all fees and taxes, as PACE claims. Rather, the RTA Act states only that entities like PACE "shall be exempt from all State and local government taxes and registration and license fees . . . ." 70 ILCS 3615/4.08. The charges at issue in this case are not taxes, nor are they registration and license fees, and therefore, PACE is not exempt from such charges.

More importantly, both the Illinois Appellate Court and the Illinois Supreme Court have squarely addressed the very issues raised by PACE in Count II of the Complaint and have held that tax-exempt entities like PACE are not immunized from payment of the charges at issue in this case. See, e.g., Waukegan Comm. Unit School Dist. 60 v. City of Waukegan, 95 Ill.2d 244, 447 N.E.2d 345 (1983); accord Commonwealth Edison Co. v. Comm. Unit School Dist. No. 200, DuPage County, 44 Ill. App. 3d 665, 358 N.E.2d 688 (2d Dist. 1976). In Waukegan and Edison, the courts correctly recognized that the incidence of the municipal gross receipts taxes at issue (65 ILCS 5/8-11-2) was on utilities like ComEd, and not on utility customers like PACE. See, e.g., Edison at 670-71, 358 N.E.2d at 692 ("It is clear that the incidence of the tax rests on the utilities, even if its burden does not . . . . Accordingly, it is the utility . . . which is the taxpayer."); also Waukegan at 256, 447 N.E.2d at 350 (quoting the same language from Edison). Applying Waukegan and Edison here, it is clear that ComEd was the

taxpayer, not PACE.[1] Accordingly, any protections from state and/or municipal taxation afforded PACE under Section 4.08 of the RTA Act are not invoked with respect to these charges.

ComEd did recover the taxes it paid from PACE and other customers by charging them an amount equal to the amount of those tax payments. ComEd's conduct in levying such a charge was always permissible under the Public Utilities Act. See 220 ILCS 5/9-221. In fact, the Supreme Court and the Appellate Court both drew a clear distinction between the taxes levied on utilities pursuant to Section 8-11-2 of the Municipal Code, and the charges collected by utilities pursuant to Section 9-221 of the Public Utilities Act. Throughout its briefs, PACE attempts to blur this distinction. To PACE, the terms "taxes" and "charges" are merely legislative labels, each being the synonym for the other. The Illinois courts that forged the distinction, in well-reasoned opinions based on facts and arguments identical to those here, concluded differently. Like plaintiffs in Waukegan and Edison, PACE did not pay municipal gross receipts taxes. Instead, it did reimburse the utility for the municipal gross receipts taxes the utility had paid through charges that were properly assessed pursuant to the Public Utilities Act. For these reasons, Count II of PACE's Complaint fails to state a claim and should therefore be dismissed.

B. The Narrow Holding in Johnson v. Partee Does not Strengthen Count II of PACE's Complaint

PACE devotes most of its Supplemental Memo to Johnson v. Partee, 105 Ill.2d 186, 473 N.E.2d 944 (1984). Partee, however, is inapposite. The sole issue in Partee was whether political subdivisions of a municipality that levies a municipal gross receipts tax on

[1] As acknowledged in ComEd's previously filed Response Memorandum, the law in Illinois has changed. After December 31, 2000, the municipal gross receipts tax is now a municipal use tax, the incidence of which is on utility customers.

utilities operating within its borders should be required to pay the Section 9-221 charges. See Partee at 189, 473 N.E.2d at 945. (Framing the issue as "whether the municipal body which imposed the tax is itself required to pay the tax or the additional charge based thereon.") (emphasis added) The Partee Court said "no," and thereby recognized a narrow exception to the pass-through provision of Section 9-221 for the taxing municipalities only. In fact, the Partee court recognized that "[t]he only customer not subject to the additional charge authorized by section [9-221] is the taxing municipality, a classification we hold that is not unreasonable." Partee at 191, 473 N.E.2d at 946. PACE, simply put, is not a "taxing municipality" that falls within the scope of this exception. Instead, it is an entity like those involved in Waukegan and Edison that the Illinois courts have held is properly subject to charges under section 9-221 of the Public Utilities Act.

C. The Commission Cannot Grant the Relief Requested

Finally, to effectuate the relief requested by PACE, namely, a refund of the recovery charges paid to ComEd, the Commission would have to eviscerate the distinction between "taxes" and "charges" forged by the Edison and Waukegan courts. In essence, the Commission would have to overturn binding Illinois precedent. Only the Illinois Supreme Court or the Illinois Legislature has this power. The Commission does not.

CONCLUSION

For the reasons stated herein and the reasons stated in ComEd's previously filed Response Memorandum Concerning Count II of PACE's Complaint, Count II fails to state a claim as a matter of law and should therefore be dismissed.

Dated: October 18, 2001

RESPECTFULLY SUBMITTED,

John W. McCaffrey
Robert C. Feldmeier
Foley & Lardner
Three First National Plaza
Suite 4300
Chicago, Illinois 60602
(312) 558-6600

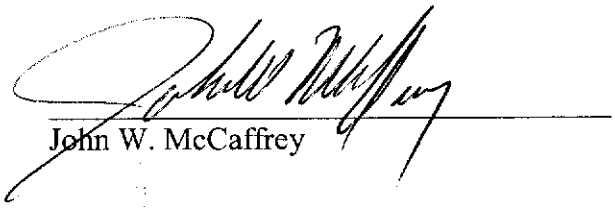
Attorneys for
Commonwealth Edison Company

CERTIFICATE OF SERVICE

I, John W. McCaffrey, do hereby certify that I served copies of Commonwealth Edison Company's Response to PACE's Supplemental Memorandum of Law in Support of Count II on the following parties, as indicated below.

Hearing Examiner Sherwin H. Zaban
Illinois Commerce Commission
State of Illinois Building
160 North LaSalle Street, C-800
Chicago, Illinois 60601-3104
(By Messenger)

Ellen Champagne
Pace Suburban Bus Service
550 West Algonquin Road
Arlington Heights, Illinois 60005
(By Federal Express)



John W. McCaffrey

STATE OF ILLINOIS

ILLINOIS COMMERCE COMMISSION

PACE, the Suburban Bus Division of the Regional Transportation Authority,	)	
Complainant,	)	
v.	)	Docket No. 00-0280
COMMONWEALTH EDISON COMPANY,	)	
Respondent.	)	

NOTICE OF FILING

TO: See Certificate of Service

PLEASE TAKE NOTICE that on this date we have filed with the Chief Clerk of the Illinois Commerce Commission, 527 East Capitol Avenue, Springfield, Illinois 62701, Commonwealth Edison Company's Response to PACE's Supplemental Memorandum of Law in Support of Count II in the above entitled matter.

Dated: October 18, 2001

John W. McCaffrey

John W. McCaffrey
Robert C. Feldmeier
FOLEY & LARDNER
Three First National Plaza
Suite 4300
Chicago, Illinois 60602
(312) 558-6600